
FURNISHINGS UNLIMITED, INC.,
a/k/a Tom Van Lieshout,

Petitioner,

Case No. 95 CV 167 vs.

DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS,

Respondent.

DECISION ON PETITION FOR REVIEW

Petitioner seeks review of a decision of the Department of Industry, Labor and Human Relations (DILHR) denying, Petroleum Environmental Cleanup Fund (PECFA) reimbursement in the amount of \$8,079.35 for underground petroleum storage tank removal. It claims that DILHR erroneously interpreted sec. 101.143(4)(c)7, Wis. Stats., governing petroleum storage remedial action awards.

FACTS

On or about June 1, 1991, Furnishings Unlimited entered into an oral agreement with Tom Van Handel, owner of Tom Van Handel Company, Inc., for removal of an underground storage tank on property owned by petitioner. Van Handel began the process of closing and removing the tank on September 3, 1991. The project was not completed until after November 1, 1991. The tank was removed on November 13 and 14, 1991. Van Handel completed its services on February 11, 1992 and was paid by check issued January 27, 1993.

Petitioner sought reimbursement from the PECFA Program in the amount of \$17,710.50. A check in the amount of \$5,880.98 was mailed to petitioner on September 24, 1993. This represented \$8,690.51 in eligible costs minus the deductible of \$2,500.00 plus 5% of all eligible costs for each occurrence. Pursuant to DILHR 47.30 (2)(a)10 [now DILHR 47.30(2)(a) 11], the PECFA Financial Manager determined that certain costs totaling \$8,079.35 were ineligible for reimbursement because they related to a tank removal after November 1, 1991.

Petitioner appealed and on February 15, 1994, DILHR affirmed the initial determination. On March 15, 1995, petitioner filed with DILHR a Petition for Hearing on Appeal. In lieu of a hearing, the parties Filed a Stipulation of Facts with the Administrative Law Judge (ALJ), acting as State Hearing Officer. The ALJ affirmed on December 22, 1994. Petitioner appealed to the Deputy Secretary of DILHR who affirmed the ALJ's decision on January 26, 1995. Furnishings Unlimited seeks review of that final decision.

RELEVANT LAW

101.143 Petroleum storage remedial action. . . (4) AWARDS FOR PETROLEUM PRODUCT INVESTIGATION, REMEDIAL ACTION PLANNING AND REMEDIAL ACTION ACTIVITIES. (a) *Awards.* 1. If the department finds that the claimant meets all of the requirements of this section and any rules promulgated under this section, the department shall issue an award to reimburse a claimant for eligible costs incurred because of a petroleum products discharge from a petroleum product storage system . . .

(c) *Exclusions from eligible costs.* Eligible costs for an award under par. (a) do not include the following:

7. Costs of emptying, cleaning and disposing of the tank and other costs normally associated with closing or removing any petroleum product storage system or home oil tank system unless those costs were incurred before November 1, 1991, or unless the claimant had signed a contract for services for activities required under sub. (3)(c) or a loan agreement, note or commitment letter for a loan for the purpose of conducting activities required under sub. (3)(c) before November 1, 1991.

Wisconsin Administrative Code, Chapter ILHR 47, "Petroleum Environmental Cleanup Fund", provides:

ILHR 47.015 Definitions. In this chapter, the following definitions shall apply. The dictionary meaning shall apply for all other words.

(8) "Costs incurred" means costs integral to the remediation of a site which have been paid by a responsible party. Costs are considered incurred when funds are disbursed to the creditor, i.e.; invoices have been paid and verification is available.

STANDARD OF REVIEW

The scope of review of an administrative decision is set forth in sec. 227.57, which provides in relevant part:

227.57 Scope of review. . . . (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.

In Jicha v. DILHR, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992), the supreme court discussed the three levels of deference that courts accord statutory interpretation in agency decisions:

First, if the administrative agency's experience, technical competence, an specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

Wisconsin courts have not interpreted the phrase "costs incurred" as set forth in sec. 101.143(4)(c)7 and DILHR refers to no past decision by the agency interpreting the phrase. DILHR makes no showing that it has expertise with PECFA other than to state that it is the agency charged with its administration. The court infers that the case is one of first impression for DILHR. Because there is no evidence that DILHR has gained special expertise through regular and repeated interpretations of the statute, the court reviews the agency's interpretation de novo.

DISCUSSION

Petitioner challenges DILHR's interpretation of "costs were incurred" in sec. 101.143(4)(c)7 to require that the applicant must have actually paid out funds. Furnishings Unlimited argues that since it entered into an oral agreement with Van Handel on June 1, 1991 and work commenced on September 3, 1991, it "incurred" costs before November 1, 1991. Petitioner contends that DILHR's interpretation is inconsistent with other language in sec. 101. 143(4)(c)7 which allows reimbursement if the claimant signed a contract for services for remedial action activities, or a loan agreement or commitment letter for a

loan for the purpose of conducting such activities. It further argues that this provision evidences legislative intent to require documentation that a claimant *either* incurred indebtedness or entered into one of the specified agreements. According to petitioner, documents such as invoices indicating services performed, but for which no payment has been made, fulfill this requirement.

Interpretation of a statute must give effect to legislative intent. The court ascertains intent by first looking to the language of the statute. Zimmerman v. DHSS, 169 Wis. 2d 498, 504, 485 N.W.2d 290 (Ct. App. 1992). The phrase "costs were incurred" in sec. 101.143(4)(c)7 is not defined in ch. 101, Wis. Stats. Chapter ILHR 47, Wis. Adm. Code, was adopted pursuant to secs. 101.143(4)(a)l and (8)(a) for the purpose of providing information on the PECFA pro-ram, outlining the processes and procedures for filing a claim and specifying the process of determining award amounts. Sec. ILHR 47.01(l). Section 101.143(4)(a) 1 specifically requires that a claimant meet all of the requirements of that section and any rules promulgated thereunder before a reimbursement award may be issued.

Respondent maintains that the sec. ILHR 47.015(8) definition of "costs incurred", *supra*, specifying costs *disbursed* to the creditor, is consistent with the intent of the PECFA program:

ILHR 47.01 Purpose....(3) INTENT OF PECFA. (a) The PECFA fund does not relieve a responsible party from liability. The individual or organization responsible for a contaminated property shall carry out the remediation of that property as specified by the department of natural resources. PECFA's role is to provide monetary awards to responsible parties who have completed and paid for remediation activities and services. . . . (emphasis added)

The court agrees that DILHR's interpretation is consistent with the statute's intent to function as a reimbursement program. Further, it is obviously necessary to place some restrictions upon the distribution of limited governmental funds. The legislature, therefore, established eligibility requirements as well as specific exclusions such as that set forth in sec. 101.143(4)(c)7. That subsection excludes costs associated with closing, and removing, petroleum storage tanks unless the costs were incurred, or the claimant signed a contract, loan agreement or loan commitment letter, before November 1, 1991. Petitioner argues that the latter language shows legislative intent to allow reimbursement costs absent

actual payment to the creditor. It further argues that the contract need not be signed, but may be either written or oral.

The court disagrees. There must be certainty and uniformity with regard to eligibility standards under PECFA. Interpretation of "costs were incurred" to mean costs disbursed to the creditor furthers this goal, allows for verification of costs, and assures the legitimacy of claims. The legislature could have excepted from the exclusion costs for *work performed* before November 1, 1991, or for which *any* type of agreement could be shown. It did not. It excepted costs *disbursed* to the creditor or, in the alternative, those for which claimant had *signed* a contract or agreement, prior to November 1, 1991. The court finds that any other interpretation would render the latter exception mere surplusage, as it specifies the documentation required to qualify under the exception. The exceptions set forth the limited circumstances under which the exclusion does not apply. This is not unduly burdensome, since compliance would simply entail a signed contract.

The court finds that the phrase "costs were incurred" in sec. 101.143(4)(c)7 is properly interpreted as costs disbursed to the creditor and that there must be a signed contract for tank removal services in order for costs to be eligible for an award under PECFA. Petitioner met neither of these requirements. The DILHR decision is hereby affirmed.

Dated at Appleton, Wisconsin this 10th day of October, 1995.

BY THE COURT:

HONORABLE JAMES T. BAYORGEON
CIRCUIT COURT JUDGE, BRANCH I
OUTAGAMIE COUNTY

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS

Furnishings Unlimited, Inc.,
c/o Tom Van Lieshout

Appellant,

vs.

PECFA Claim #54911-4660-11

Secretary, DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

Respondent.

FINAL DECISION

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition filed March 15, 1994, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.531, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a stipulation was entered into by the appellant and the Department.

The issue for determination is whether the department's decision denying Petroleum Environmental Cleanup Fund (PECFA) reimbursement in the amount of \$8,690.51 was reasonable. This amount was denied because it represents costs related to a tank removal which were incurred after November 1, 1991.

The stipulation was agreed to by:

PARTIES IN INTEREST:

Furnishings Unlimited, Inc., c/o Tom Van Lieshout
By: Attorney John D. Claypool
Herrling, Clark, Hartzheim & Siddall Ltd.
31 North Lyndale Drive
Appleton, WI 54914

Department of Industry, Labor and Human Relations
201 East Washington Avenue
P.O. Box 7946
MADISON WI 53707-7946
By: Kristiane Randal, Assistant Legal Counsel

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary.

The Hearing Examiner issued a proposed decision in this case dated December 22, 1994. The parties were given 20 days to file objections. The appellant filed objections to the proposed decision. Having considered the proposed decision and the objections, the matter is now ready for final decision.

FINAL DECISION

The Proposed Decision dated December 22, 1994, is hereby adopted as the final decision of the department, with the following addition:

OPINION

It is clear from the stipulation that, although some work was done on the tank removal before November 1, 1991, the applicant did not pay for the work until January 27, 1993. The department has interpreted the words "costs were incurred" in § 101.143(4)(c)7, Stats-, to require that the applicant must have actually paid out funds. This is consistent with the legislative intent that the PECFA program function as a reimbursement program. Under this standard, the applicant did not incur costs before November 1, 1991.

NOTICE TO PARTIES

Request for Rehearing.

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence, which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office-of-Legal Counsel, P. O. Box 7946, Madison, WI 53707-7946.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227-49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for Judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel, 201 E. Washington Avenue, Room 400x, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Signed and dated in Madison, Wisconsin this 26th day of
January, 1995.

Patrick J. Osborne, Deputy Secretary
Department of Industry, Labor & Human Relations
P O Box 7946
Madison WI 53707-7946
Telephone: 608-266-7552
Facsimile.- 608-266-1784

cc: Parties in Interest

Before the Department of Industry, Labor and Human Relations

PROPOSED HEARING OFFICER DECISION

In the matter of the denial of
reimbursement of PECFA Program Funds to:

Claim No. 54911-4660-11

Furnishings Unlimited, Inc.
c/o Tom Van Lieshout 127 S. Memorial Drive Appleton, WI 54911

STATE HEARING OFFICER: Jo Ellen Rehbein

REPRESENTATIVES:

Applicant: Attorney John D; Claypool
Herrling, Clark, Hartzheim
and Siddall Ltd.
301 N. Lyndale Drive
Appleton, WI 54914

Department: Attorney Kristiane Randal DILHR
201 E- Washington Ave
Room 400x
P.O. Box 7946
Madison, WI 53707

NOTICE OF RIGHTS

Attached is the Proposed Findings of Fact, Conclusions of Law and Decision in the above stated matter. Any party aggrieved by the pro-posed decision has the right to file written objections to the findings of fact, conclusions of law, or order. Such written objections must be filed within twenty (20) days from the date this Proposed Decision is mailed. The individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter is Patrick J. Osborne, Deputy Secretary of the Department of Industry, Labor and Human Relations, whose address is 201 East Washington Avenue, Room 400X, Madison, Wisconsin 53707. All written objections should be addressed directly to Mr. Osborne.

Dated and Mailed: December 22, 1994

STATE OF WISCONSIN

**BEFORE THE
DEPARTMENT OF INDUSTRY, LABOR
AND HUMAN RELATIONS**

In the matter of the denial of
reimbursement of PECFA Program
funds to

Fox Valley Hearing Office
2900 N. Mason St.
Suite B
Appleton, WI 54914
Phone: (414) 832-2764

FURNISHINGS UNLIMITED, INC.

PECFA Claim. No. 54911-4660-11

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

On September 24, 1993, the Department of Industry, Labor and Human Relations issued an award under the PECFA program allowing reimbursement in the amount of \$5,880.98 and denying reimbursement in the amount of \$8,690.51- Furnishings Unlimited, Inc., filed an objection and on February 15, 1994, the Department issued a decision affirming the initial determination. On March 15, 1994, the Department received a Petition for Hearing on Appeal. In lieu of a hearing, the parties stipulated to the relevant facts and furnished the stipulation to Administrative Law Judge Jo Ellen Rehbein, acting as state hearing officer-

The Department's request to exclude exhibits attached to the Appellant's brief, which were not stipulated to, is granted.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

PROPOSED FINDINGS OF FACT

1. The stipulation entered into by Attorney Kristiane Randal, on behalf of the department, and Attorney John D. Claypool, on behalf of Furnishings Unlimited Inc., which is attached hereto, is incorporated by reference as the proposed findings of fact.

PROPOSED CONCLUSIONS OF LAW

1. Furnishings Unlimited Inc., (hereinafter applicant) is an owner-operator within the meaning of section 101.141 of the Wisconsin Statutes.

2. Prior to November, 1 1991, the applicant did not incur costs associated with the emptying, cleaning, disposing of a tank, or other costs normally associated with the closing or removing of a petroleum product storage system or home oil tank under section 101.143(4)(c)7 of the Wisconsin Statutes or ILHR 47.01(9). (Under ILHR 47.01(9) costs are considered incurred when funds are disbursed to the creditor, i.e.; invoices have been paid and verification is available.)

3. Prior to November 1, 1991, the applicant did not have a signed contract for services for activities required, under section 101.143(4)(c)7 of the Wisconsin Statutes.

4. Prior to November 1, 1991, the applicant did not have a Than agreement, note or commitment letter for a loan for the purpose of conducting activities, under section 101.143(4).(c)7 of the Wisconsin Statutes.

5. The Department's action denying reimbursement in the total amount of \$8,690.51, which is under appeal, was reasonable under section 101.143(4)(c)7 of the Wisconsin Statutes and ILHR 47.

PROPOSED DECISION

The State Hearing Officer therefore finds that the decision of the Department of Industry, Labor and Human Relations dated September 24, 1993, establishing the final reimbursable costs to the applicant, Furnishings Unlimited, Inc., was reasonable and is affirmed.

STATE HEARING OFFICER

Jo Ellen Rehbein

Dated and Mailed

December 20, 1994

Stipulations of Fact

The parties hereby stipulate to the following facts:

1. Tom Van Lieshout is the president of Furnishings Unlimited, Inc. ("Furnishing Unlimited").
2. Tom Van Hande, is the owner of Tom Van Handel Company, Inc. ("Van Handel").
3. Tom Van Lieshout entered into an oral agreement with Tom Van Handel on or about June 1, 1991, agreeing that Van Handel would perform services for Furnishings Unlimited. Those services were to include emptying, cleaning and disposing of an underground storage tank located on property owned by Furnishings Unlimited located at 311 Clark Street ('the Site').
4. By September 3, 1991, Van Handel began the process of closing and removing the underground storage tank. Specifically, labor was performed by two Van Handel employees at the Site.
5. The project of cleaning and disposing of the storage tank was completed after November 1, 1991.
6. The actual removal of the underground storage tank took place on November 13 & 14, 1991.
7. Van Handel completed its services for Furnishings Unlimited on February 11, 1992.
8. Van Handel was issue a check for its services on January 27, 1993.
9. On March 4, 1993, the Safety and Buildings Division received Form 4, DNR Site Investigation and Remedial Action Plan Review from Tom Van Lieshout for the Site.
10. On June 23, 1993, the Safety and Buildings Division received from Tom Van Lieshout for the Furnishings Unlimited site: Form 1, Remedial Action Fund Application; Form 2, Petroleum Storage Remedial Action Fund Cost Summary; and, the Site's Closure Assessment.
11. Furnishings Unlimited sought reimbursement from the PECFA Program in the amount of \$17,710.50.
12. The cost amounts found to be eligible under the PECFA Program were \$8,690.51.
13. Tom Van Lieshout was mailed a check on September 24, 1993, in the amount of \$5,880.98, representing the \$8,690.51 submitted in eligible costs minus the deductible of \$2,500.00 plus 5% of all eligible costs for each occurrence.
14. In addition to several cost items not a part of this appeal, the following costs were denied by Therese L..Schroeder, the PECFA Financial Manager, because the costs relate to a tank removal after November 1, 1991:

- A. \$1,575.00, costs associated with emptying, cleaning, disposing of storage tank systems and other costs normally associated with closing or ' removing any petroleum product storage tank system after November 1, 1991, is not eligible under §ILHR 47.30(2)(a)10.
 - B. \$607.50, costs associated with emptying, cleaning, disposing of storage tank systems and other costs normally. associated with closing or removing any petroleum product storage tank system after November 1, 1,991, is not eligible under §ILHR 47.30(2)(a)10.
 - C. \$3,872.80, costs associated with emptying, cleaning, disposing of storage tank systems and other costs normally associated with closing or removing any petroleum product storage tank system after November 1, 1991, is not eligible under §ILHR 47.30(2)(a)10.
15. On February 7, 1994, the Department received a request for re-review and on February 15, 1994, the Department affirmed its initial decision.
16. On March 15, 1994, the Department received a Petition for Hearing on Appeal.

Dated this 22nd day of August, 1994.

Kristiane Randal, Assistant Legal Counsel
Department of Industry, Labor & Human Relations
201 E. Washington Avenue, Room 400x
P.O. Box 7946
Madison, WI 53707-7946
608-267-4433 (telephone)
608-266-1784 (FAX)

Dated this 25th day of August, 1994.

John D. Claypool
Attorney for Furnishings Unlimited, Inc.
Herrling, Clark, Hartzheim & Siddall Ltd.
31 North Lyndale Drive
Appleton, WI 54914
414-739-6352 (telephone)
414-739-7366 (FAX)